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IN THE

Supreme Court of the United States

October Term, 1954

No. 198

WILLIAM SILVERMAN, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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No.

WILLIAM SILVERMAN, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, William Silverman, in support of his petition for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Fifth Circuit, entered on June 9, 1954, affirming the petitioner's conviction in the United States District Court for the Northern District of Georgia, for alleged violations of Title 18, U. S. C., Sections 1341 and 1342, respectfully shows:

OPINION BELOW

There is no opinion in this cause by the United States District Court for the Northern District of Georgia. The

opinion of the United States Court of Appeals for the Fifth Circuit has not been reported. A copy thereof is contained in the Appendix hereto.

THE JURISDICTION OF THIS COURT

1. The Date of the Judgment to be Reviewed.

The judgment of the United States Court of Appeals for the Fifth Circuit affirming the conviction of the petitioners was entered on June 9, 1954 (R. 369). This petition, with the certified record, is filed within thirty days after final judgment.

2. Stay of Mandate.

A stay of mandate was issued by the United States Court of Appeals for the Fifth Circuit on June 25, 1954. The order is set forth in the Appendix hereto.

3. Statutes and Rules Conferring Jurisdiction.

Jurisdiction is conferred upon this Court by Title 28, U. S. C., Section 1254. See also paragraph 2 of Rule 22 of this Court and Rule 37 (b) of the Federal Rules of Criminal Procedure, following Title 18, U. S. C., Section 3771, on page 1025. These statutes and rules are set forth in the Appendix hereto.

REASONS FOR GRANTING THE WRIT

1. The opinion of the United States Court of Appeals for the Fifth Circuit, affirming petitioner's conviction, was based on such a misinterpretation of the facts which constituted the essence of the Government's case as to call for this Court's review.

2. The absence of any substantial evidence in this cause to prove the alleged scheme to defraud with which the petitioner was charged is so apparent from the record filed herein that the petitioner's conviction, and the affirmance thereof by the United States Court of Appeals for the

Fifth Circuit, was such a miscarriage of justice, and infringement on the rights of the petitioner, as to call for this Court's review.

3. The action of the trial court in permitting recipients of solicitations mailed by the petitioner to testify with respect to the impression made on their minds by such solicitations, and the failure of the United States Court of Appeals for the Fifth Circuit to reverse petitioner's conviction by reason thereof, constituted error so prejudicial to the rights of the petitioner as to call for this Court's review.

QUESTIONS PRESENTED FOR REVIEW

1. Was the opinion of the United States Court of Appeals for the Fifth Circuit based on a misapprehension of facts which constituted the essence of the Government's case?

2. Does the record herein contain any substantial evidence to support petitioner's conviction?

3. Did the testimony of recipients of solicitations mailed by the petitioner as to the impression made on their minds by such solicitations at a time when they admittedly had not read the solicitations constitute valid evidence?

STATUTES INVOLVED

The statutes involved in this cause are Sections 1341 and 1342, Title 18, U. S. C. They are set out verbatim in the Appendix hereto.

STATEMENT OF THE CASE

1. Jurisdiction of the Trial Court.

Jurisdiction of the United States District Court for the Northern District of Georgia over this cause is conferred by Title 18, U. S. C., Section 3231, which section is set forth in the Appendix hereto.

2. Proceedings in the Courts Below.

On March 12, 1953, the Grand Jury for the United States District Court for the Northern District of Georgia returned an indictment in fifteen counts against the petitioner. Counts one to thirteen, inclusive, charged the petitioner with using the United States mails, or causing them to be used, for the purpose of furthering a scheme to defraud in violation of Title 18, U. S. C., Section 1341. Count fourteen charged the petitioner with the use of a fictitious name, and Count fifteen with the use of a fictitious address, both for the purpose of furthering the fraudulent scheme charged in Count one, in violation of 18 U. S. C., Section 1342 (R. 1-10). On July 14, 1952, the petitioner was found guilty by a jury on all fifteen counts (R. 349) and, on October 30, 1953, the trial court sentenced him to two years' imprisonment on each of the fifteen counts, the sentences to run concurrently (R. 350). On June 9, 1954, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the trial court (R. 368).

As a part of the record before the United States Court of Appeals, the parties stipulated that Judson Ackerman, W. R. Godbey, C. W. Patrick, James H. Barron and W. C. Caye gave testimony at the trial substantially to the same effect as that given by witnesses J. F. Therrell and Hix Green with respect to the receipt of solicitation literature through the mails, the effect such literature had upon them, and the transmission through the mails of checks in payment of listings in the directory, and that their testimony need not be transcribed but could be considered by the Court to the same effect and manner as if it had been transcribed and contained in the record (R. 358).

3. The Scheme to Defraud.

Although the Government in this cause might have based the prosecution on the theory that defendant made promises which he had no intention of performing, it elected not to proceed on this theory, but instead charged in the

indictment that the solicitations were prepared in the similitude of Southern Bell Telephone and Telegraph Company statements or bills so that the recipient would make a remittance to the petitioner, thinking he was responding to a telephone company bill. The United States Court of Appeals for the Fifth Circuit describes the alleged scheme to defraud in the following words:

> The scheme and artifice, charged in paragraph one of the first count, was to defraud a large number of designated persons and business firms whose names were listed in the yellow section of the telephone directory published for the Atlanta, Georgia, area by the Southern Bell Telephone and Telegraph Company. The scheme was to solicit money from such persons by printed slips, similar to the statements of said telephone company, with the intention of deceiving said persons and causing them to remit money to the defendant by mail under the misapprehension that they were paying for renewals of previously published listings and advertisements in the classified directory of said company (R. 364-365).

4. Statement of the Facts.

In June, 1952, petitioner entered the directory publishing business in Cleveland, Ohio (R. 244). He was familiar with existing directories and hoped that he would be able to publish similar directories which would reach a select group of purchasers, and give greater coverage in trade areas than a city directory would (R. 101-102, 244-245, 259-260, 266). As a matter of business precaution, petitioner consulted an attorney before entering into the Cleveland enterprise and he was advised that his solicitation literature was legal (R. 175, 302, 304). After five or six weeks had elapsed, petitioner received a notice of a Postal fraud order hearing (R. 246). A default order was entered against him because his attorney filed answer one day too late (R. 100, 245-247).

As a result of this fraud order, petitioner consulted with additional attorneys, including an attorney for the Federal

Trade Commission. These attorneys advised him that his business was legal, and that his solicitation literature, with some alterations and changes made by the attorneys, complied with the law (R. 82, 98, 167-169, 247-248, 268-270, 301-302, 304-305).

While in Cleveland, petitioner had had several discussions with Government witness, Ben Porath, who was in the direct mail advertising and printing business in Cleveland, relative to petitioner's business (R. 117, 122-123, 248). As a result of these conversations, petitioner and Porath reviewed a number of solicitation mailings by other directory companies, and it was decided to conduct a directory solicitation in Atlanta, Georgia, using the blue Cleveland literature, as changed by petitioner's attorneys (R. 125, 127-130, 167, 247, 298), and a white form which Porath had received from the Ohio Directory Company (R. 134, 159-160).

Petitioner also entered into an oral agreement with Porath to print all of the directories published by the petitioner, including the Atlanta directory, provided that the price was competitive (R. 138-140, 158-159, 248). Certain arrangements had been entered into between the two for the publication of the Cleveland directory, the printing of which had been put off at Porath's suggestion (R. 138-139, 142-143, 153-158, 160, 263-264). Petitioner also hired Porath to print and mail the Atlanta solicitation material, paying him approximately nineteen hundred dollars therefor (R. 140-141, 147, 149, 249).

On August 21, 1952, petitioner rented office space at Atlanta, Georgia, from the Barrows Mailing Service, 134 Whiteford Avenue, S. E. (R. 250). Petitioner showed Barrows the type of literature he was to circulate in Atlanta, and Barrows said that Atlanta could use a directory (R. 251). Petitioner, in compliance with the Georgia law, then registered his trade name and address with the Clerk of the Superior Court of De Kalb County (R. 252, 346). The application form was filled out personally by the Clerk after petitioner had informed him that he was a non-resident of Georgia but intended to move to Atlanta (R. 252).

Petitioner gave the Clerk the address of the Barrows Mailing Service and was advised to register it as an office address and that that would be sufficient (R. 252).

Petitioner then went back to Cleveland to complete the arrangements for the printing of the solicitation forms (R. 252-253). He wanted the solicitations mailed on or about October 1, 1952, but Porath suggested that they be mailed on October 6 to avoid heavy magazine mailings (R. 146-147, 162, 254). Thirty thousand mailings were made on October 6, 1952 (R. 8, 30).

Petitioner returned to his Atlanta office on or about October 6, (R. 31, 295). He found a letter from the Better Business Bureau, written about two weeks before, asking him to stop by and see them (R. 295). He did so and offered to, and did, have his attorney call and write to the Bureau offering to place a cash or surety bond in any amount to guarantee the publication of an Atlanta directory (R. 267, 294). The offer was refused (R. 267).

On October 7, 1952, petitioner had Government witness, Mrs. Ellis fill out an application to receive mail form required in certain cases by the postal regulations (R. 46-47, 92, 257). That evening a postal clerk brought the form back and said that it had not been filled out properly and asked that another form be filled out and he would call for it the next day (R. 89, 257).

The next day, while petitioner was showing Barrows and Mrs. Ellis a dummy of the proposed Atlanta directory, Inspector Callahan of the Post Office Department walked in (R. 61, 257), and notified the petitioner that his mail was being held up (R. 256), apparently because Barrows had not signed the application as petitioner's agent (R. 92). Barrows had not signed the application because he had been warned not to do so (R. 50-51). As a result the only mail received by petitioner while he was a tenant of Barrows were thirty solicitation letters returned for postage (R. 48, 55, 256, 258, 366).

During his visit Callahan advised petitioner that he was investigating the solicitations from both the fraud order

angle and for the purpose of criminal prosecution (R. 63). Petitioner called his attorney in New York and after talking to him advised Callahan that the attorney had told him the whole thing was alright, that he should go ahead with the business, and that the Post Office Department had nothing to do with criminal proceedings (R. 64).

Immediately after Callahan's visit, Barrows told petitioner he had to move (R. 257). Petitioner rented another office (R. 257), and, although he filled out an application to receive mail at the new address (R. 95), he did not receive any (R. 258).

A few days thereafter petitioner, having been advised by his attorney that he was acting in accordance with the law, and believing that he was, filed an injunction proceeding against the Postmaster at Atlanta to restrain him from holding his mail (R. 98, 258). On November 3, 1952, before the injunction proceeding could be heard, the Post Office Department brought a fraud order proceeding against petitioner (R. 83-84). Petitioner then consented to an order of the Court directing that the mail be held by a representative of the Post Office and a representative of the petitioner until such time as the fraud order proceeding had been disposed of (R. 98, 106, 108, 258). On or about December 16, 1952, the Post Office Department issued a fraud order against petitioner (R. 271), and the impounded money was returned to the senders at petitioner's expense (R. 106-108, 258). Three hundred and fifty letters, containing checks in the total amount of approximately seven thousand dollars, were impounded (R. 236, 366).

5. The Solicitation Form.

A reproduction of the blue solicitation form is contained in the Appendix. See testimony of G. A. Heath, Vice President, Campbell Coal Company (R. 179-180, 182-183).

ARGUMENT

1. Was the Opinion of the United States Court of Appeals for the Fifth Circuit Based on a Misinterpretation of the Facts which Constituted the Essence of the Government's Case?

(a) The Court of Appeals found that the intent to defraud on the part of the petitioner was shown by the scheme

> —which consisted of mailing solicitation forms to advertisers and subscribers of the classified directory of the Southern Bell Telephone and Telegraph Company *at such time and under such circumstances* as to mislead the recipients into thinking that it was a statement from the telephone company for the payment of previously published listings in the company's classified directory,—(R. 364). (Italics supplied)

The Court's finding with respect to time and circumstances could only be an adoption of the theory of the Government that petitioner timed the mailings of his solicitations to coincide with the announcements of the telephone company of the closing date of its yellow classified directory, which closing date was about thirty days after the petitioner's mailings (R. 189-191, 195-196, 204-205, 207-211).

In order to reach the above conclusion the Court had to find from the evidence contained in the record (1) that the petitioner had knowledge of the announcements of the telephone company; (2) that the recipients of petitioner's solicitations had knowledge of such announcements; (3) that the petitioner knew that such recipients had such knowledge, and (4) that the recipients were misled by petitioner's solicitations because of their knowledge of the announcements.

The record is entirely void of any evidence to support the Court's finding. The Government itself admitted that it was not able to show actual knowledge on the part of the petitioner of the announcements of the telephone company (R. 114, 204), and the petitioner denied that either

he or Ben Porath had any knowledge thereof (R. 253-254). Consequently, any finding that petitioner had knowledge of such announcements would have to be based on an inference, and with a complete disregard of petitioner's sworn testimony to the contrary.

No recipent of petitioner's solicitations testified that he had knowledge of the announcements. Consequently, another inference must be drawn to show knowledge on the part of the recipients.

There is no evidence in the record to indicate that the petitioner had knowledge that any recipient of his solicitations had knowledge of the announcements. A third inference must be drawn to establish that fact.

Finally, no recipient testified that because he knew that the telephone company was going to publish a new yellow classified directory, and had set a closing date for copy thereof, he was misled into believing that petitioner's solicitations represented a statement from the telephone company for previously published listings. To justify such a conclusion would necessitate invoking a fourth inference.

Four inferences, one on another, are required to sustain the Court of Appeals' finding with respect to facts constituting the essence of the scheme to defraud, described by the Court, and admitted by the Government when it stated "These solicitation forms and the timing of their distribution are the essence of the Government's case." (Government's Brief before the Court of Appeals, p. 2)

An inference essential to the establishment of a crime cannot be rested upon another inference. *Brady* v. *United States,* 8 Cir., 24 F. 2d 399, 404; *United States* v. *Ross,* 92 U. S. 281, 283, 23 L. Ed. 707; *Whealton* v. *United States,* 3 Cir. 113 F. 2d 710, 713.

(b) The Court of Appeals found that the above quoted scheme

> —in fact, induced some 350 recipients to respond with payments to appellant of a sum totaling $7,000 (R. 364).

There is no evidence in the record to substantiate this statement. No payments were made to the petitioner. All responses mailed to him were intercepted by the Post Office Department (R. 48, 55, 256, 258, 366). The record does show that only seven recipients testified that they had mailed remittances to the petitioner under the impression that they were paying telephone company bills (R. 366). To say how many of the other three hundred and fifty recipients who mailed responses were under the same impression would be sheer guesswork.

(c) On page 366 of the record, the Court stated:

> Seven witnesses, who had each received one of the forms and mailed a check in response thereto, testified that the impression was made upon their minds *by reading the form* was that it was a statement from the telephone company. (Italics supplied).

The record does not bear out the statement that the recipients read the forms. Government witness, Hix Green, one of the seven witnesses, testified in so many words that he did not read the solicitation form (R. 27-28), but that if he had he would have known that he was not dealing with the telephone company (R. 28). See also the testimony of J. F. Therrell (R. 19). The testimony of the other five witnesses was, by stipulation, admitted to be of the same effect (R. 358).

A reading of the opinion leads to the inevitable conclusion that the Court of Appeals placed considerable weight upon the facts so misinterpreted by it, facts which constituted the essence of the Government's case. Petitioner believes that if the Court of Appeals had placed the proper interpretation on these facts, it would have come up with a different answer. Under the circumstances, justice requires a review by this Court.

2. Does the Record Herein Contain Any Substantial Evidence to Support Petitioner's Conviction?

Although your petitioner recognizes that ordinarily this Court will not review questions of evidence, the petitioner's innocence is so plainly consistent with the facts as to call for review by this Court. This is all the more necessary because of the misinterpretation by the Court of Appeals of the facts constituting the essence of the Government's case. It is respectfully submitted that a fair examination of the record will conclusively demonstrate that the substantial evidence of the facts of the case are as consistent with petitioner's innocence as with his guilt, and that there is no substantial evidence in the record to support his conviction.

The intention on the part of the petitioner to execute the alleged scheme to defraud was allegedly shown by the Government by (1) the solicitations forms themselves, and (2) the fact that the petitioner mailed the forms at a time which coincided with the announcement by the telephone company of the publication of a new classified directory. Point (2) has been adequately discussed in 1 (a) of the Argument. Petitioner incorporates the reasoning contained therein at this point by reference and requests this Court to consider such argument as though it were physically set forth in full.

With respect to point (1) above, petitioner points out that the wording of the solicitation form specifically pointed out in italicized letters that there was no connection with any other directories, or the Atlanta Telephone Company, or its affiliates. (R. 27, 182-183, 223, 228-229, 233) Petitioner is familiar with the line of cases cited by the United States Court of Appeals to the effect that "if a scheme is devised with intent to defraud,—the fact that there is no misrepresentation of a single existing fact, makes no difference." (R. 367-368) Here, however, we find not only that there is no misrepresentation of a material fact, but there is an actual disclaimer of the very facts which the Government contends constitutes the

fraud. Petitioner does not believe that the above rule has application where the only instrument through which a fraud might be perpetrated declares its full import in plain language on its face. Nothing is omitted, concealed or misrepresented. There is no deception. The wording is plain and easy to read, thereby avoiding the criticism directed by this Court in *Donaldson* v. *Read Magazine,* 333 U. S. 178, 68 S. Ct. 591. In that case this Court said:

> Advertisements as a whole may be completely misleading although every sentence separately considered is literally true. This may be because things are omitted that should be said, or because advertisements are composed or purposely printed in such way as to mislead.

In the present cause, nothing was omitted from the solicitation form which should have been said. The disclaimers were complete. The forms were not printed in such form as to deceive. The only similarity between the petitioner's solicitation form and the statements of the telephone company that the directory manager of the company could see was that the firm names were on top of the respective forms, and that they were approximately the same size (R. 196). The telephone company statement bears the Bell System symbol, and across the top bears the words "Southern Bell Telephone and Telegraph Company". (R. 197). The use by petitioner of clippings from the classified yellow telephone directory merely conformed to the custom of the advertising trade where it is common practice for one publication to clip ads from other publications for the purpose of soliciting a similar ad (R. 161-162). An examination of the solicitation form will convince this Court that it is far from being in the "similitude" of a telephone company statement.

The Government's proof with respect to petitioner's guilt depended entirely upon circumstantial evidence. Consequently, the burden rested upon it to prove its case, not beyond a reasonable doubt, but to the exclusion of every reasonable hypothesis of innocence. *Beckman* v.

United States, 5 Cir., 96 F. 2d 15, 16; *Gold* v. *United States,* 8 Cir., 36 F. 2d 16, 32.

Petitioner demonstrated his good faith and lack of intent to defraud by making the proper disclaimers in his solicitation form (R. 27, 182-183, 223, 228-229); by his agreement with Ben Porath to print an Atlanta directory (R. 139); by his clearance of his solicitation forms with his attorneys before he used them (R. 125, 127-130, 167, 247, 298); by his appearing before the Better Business Bureau of Atlanta with an offer to post bonds for the publication of a directory. (R. 267, 294); and by his injunction suit to recover his mail after it had been impounded by the Post Office Establishment (R. 98, 258).

Petitioner respectfully suggests to this Court that the facts adduced at his trial not only shows that the Government did not prove its case to the exclusion of every reasonable hypothesis of innocence, but demonstrates petitioner's complete innocence, which should have resulted in a reversal of his conviction by the United States Court of Appeals for the Fifth Circuit. See *Yusem* v. *United States,* 3 Cir., 8 F. 2d 6, 8, and cases cited therein.

3. Did the Testimony of Recipients of Solicitations Mailed by the Petitioner as to the Impression Made on Their Minds by the Solicitations at a Time when They Had Admittedly Not Read the Solicitations, Constitute Valid Evidence?

Seven witnesses, who had each received one of petitioner's solicitation forms and mailed a remittance in response thereto, were permitted to testify, over objection, that the impression made upon their minds by the form was that it was a statement from the telephone company (R. 14, 23, 27, 359). These witnesses also testified that at the time such impression was obtained, they had not read the form (R. 19, 27-28, 358).

The importance of this testimony is well demonstrated by the fact that in refusing to direct a verdict for the petitioner, the trial court placed heavy emphasis on it as a reason for his refusal (R. 241). The effect of this

testimony must have been equally strong, if not stronger, upon the jury.

If the witnesses had read the solicitation forms and thereafter had reached the conclusion that the solicitation form was a bill from the telephone company, petitioner would have no objection to the testimony. However, it was highly prejudicial to permit such testimony where the witnesses had not read the form, particularly when they admitted that if they had read it, they would have known that the form was not a telephone company bill.

CONCLUSION

For the reasons stated in the foregoing petition, it is respectfully submitted that the petition for a writ of certiorari be granted.

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APPENDIX

Opinion of the United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14818

WILLIAM SILVERMAN, *Appellant,*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Northern District of Georgia.

(June 9, 1954.)

Before HUTCHESON, Chief Judge, HOLMES, Circuit Judge, and WRIGHT, District Judge.

HOLMES, Circuit Judge: Appellant was found guilty by a jury on an indictment charging him with using the mails to accomplish a scheme to defraud, in violation of Sections 1341 and 1342 of Title 18 of the United States Code, and from the judgment entered upon the verdict he appeals to this court.

Necessary elements of the offenses are as follows: (1) intention to defraud, and (2) execution of the intention by use of the mails. The scheme need not be fraudulent upon its face, and need not misrepresent any fact, because all that is necessary is that it be a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension, and that the mail service of the United States be used in the execution of the scheme. The intention to defraud is shown by the scheme, which consisted of mailing solicitation forms to advertisers and subscribers of the classified directory of the Southern Bell Telephone and Telegraph Company at such time and under such circumstances as to mislead the recipients into thinking that it was a statement or bill from the telephone company for the

payment of previously published listings in the company's classified directory, and which, in fact, induced some 350 recipients to respond with payments to appellant of a sum totaling $7,000.

The indictment contains fifteen counts, each of which, from 2 to 15, realleges all of the facts stated in the first count except those contained in the last paragraph thereof. The scheme and artifice, charged in paragraph one of the first count, was to defraud a large number of designated persons and business firms whose names were listed in the yellow section of the telephone directory published for the Atlanta, Georgia, area by the Southern Bell Telephone and Telegraph Company. The scheme was to solicit money from such persons by printed slips, similar to statements of said telephone company, with the intention of deceiving said persons and causing them to remit money to the defendant by mail under the misapprehension that they were paying for renewals of previously published listings and advertisements in the classified directory of said company. Paragraph two of each count alleges specific acts committed by the defendant for the purpose of executing the aforesaid scheme and artifice, and causing the United States mail facilities to be used. No objection was interposed to the indictment and, a plea of not guilty thereto having been entered by the defendant, a jury trial on the merits was had as above stated.

The evidence before the jury was to the effect that, in the further execution of the scheme, operating under the names of Atlanta Classified Directory and Atlanta Classified Business Directory, appellant prepared and mailed some 30,000 solicitations for listings in a proposed classified business directory to individuals and business firms located in Atlanta. All of the addressees were subscribers to and advertisers in the Classified Section of the Atlanta Telephone Directory, which is printed on yellow paper, bound with the regular telephone directory, and published by the Southern Bell Telephone and Telegraph Company.

He also posted clippings from the yellow pages of said directory on his solicitation forms, used the same business classification headings that appeared in the classified section of the telephone company's directory, and mailed said forms as above stated. The indictment charged that the use of the printed slips in the similitude of statements used by the Southern Bell Telephone and Telegraph Company purported to signify to the recipients that it was a statement for account of previously published listings. Three hundred and fifty responses were mailed to appellant, which were intercepted by the post office department because of suspected fraud. A substantial number of the responses contained remittances, which totaled $7,000.

Seven witnesses, who had each received one of the forms and mailed a check in response thereto, testified that the impression made upon their minds by reading the form was that it was a statement from the telephone company. Further testimony revealed that the appellant did not have a permanent office in Atlanta, but had secured the use of a mailing-service company, to which the responses were sent. Although the appellant, in registering to do business in Georgia, gave the address of the mailing company as his residence, evidence was introduced at the trial showing that it was not his residence. He testified that he, in good faith, was in the process of compiling and publishing a new classified directory, and denied that he intended to defraud or deceive anyone. In support of these assertions, he introduced evidence tending to show that he had made some arrangements for the publication of a directory, although no contract had been made; that he had registered to do business in Atlanta; that he had rented an office in Atlanta; and that if the notices or forms had been read by the addressees, it is apparent that no one would have been deceived. All testimony tending to show good faith on the part of the appellant was admitted in evidence, and the court was very careful to charge the jury upon the subject of good faith.

On appeal, the appellant assails the verdict of the jury as being contrary to the weight of the evidence, and contends that the evidence was insufficient to support such a verdict. We think that the questions of good faith and intent were peculiarly for the jury, and that there was sufficient evidence to support the verdict. The court was eminently fair in its charge; it gave heed to all objections made by the appellant, and re-charged the jury according to instructions requested by appellant. No objection was made or exception taken by the appellant to the court's final charge to the jury.

The appellant maintains that the court committed error by refusing to grant him a directed verdict, because the evidence showed that he did not make any false statements in the forms that he mailed, and that his acts did not, as a matter of law, show any intent or scheme to defraud. The solicitation form, if closely read, does disclose that the proposed publication was new and not connected with any other directory or with the Atlanta Telephone Company; but the law is well settled that, if a scheme is devised with the intent to defraud, and the mails are used in executing the scheme, the fact that there is no misrepresentation of a single existing fact makes no difference. It is only necessary to prove that it is a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension, and that the mail service of the United States was used and intended to be used in the execution of the scheme. *Durland* v. *U. S.*, 161 U. S. 306; *Fournier* v. *U. S.*, 58 Fed. (2) 3; *Harrison* v. *U. S.*, 200 Fed. 662; *Oesting* v. *U. S.*, 234 Fed. 304; *Kaufman* v. *U. S.*, 282 Fed. 776.

Whether the acts of appellant showed beyond every reasonable doubt a scheme and intent to defraud as charged in the indictment was a question for the jury; and we think that we would not be justified in disturbing the verdict of the jury. It was proper to introduce the testimony of the recipients of the solicitation as to the effect the solicitation had on their minds; and their act in responding to this

solicitation demonstrates the fraudulent impression that it created in their minds. Accordingly, the judgment appealed from is affirmed.

AFFIRMED.

Order for Stay of Mandate

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14818

WILLIAM SILVERMAN, *Appellant,*

versus

UNITED STATES OF AMERICA, *Appellee.*

ON CONSIDERATION OF THE APPLICATION of the Appellant in the above numbered and entitled cause for a stay of the mandate to this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days from June 9, 1954, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from June 9, 1954 there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from June 9, 1954, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 25th day of June 1954.

(Signed) E. R. HOLMES
United States Circuit Judge.

TITLE 28, U. S. C.

Section 1254: Courts of Appeals; certiorari; appeal, certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree:

* * * * * * * * * *

RULE 22. Review on certiorari—Time for petitioning.

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(2) A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within thirty days after the entry of such judgment. * * *.

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RULE 37. Taking appeal.

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(b) Petition for Review on Writ of Certiorari.

(1) Petition. Petition to the Supreme Court for writ of certiorari shall be made as prescribed in its rules.

(2) Time of Making Petition. Petition for writ of certiorari may be made within 30 days after entry of the judgment or within such further time not exceeding 30 days as the Court or a justice thereof for cause shown may fix within the 30-day period following judgment. * * *.

TITLE 18, U. S. C.

Section 1341. Frauds and swindles.

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious

article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Section 1342. Fictitious name or address.

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Section 3231. District Courts.

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

* * * * * * * * * *

TO ASSURE INSERTION OF YOUR REPRESENTATION IN THIS NEW DIRECTORY RETURN THIS FORM WITH YOUR CHECK

FOR NECESSARY INFORMATION REGARDING THE INSERTION OF YOUR AD IN OUR DIRECTORY, SEE OUR ENCLOSED DESCRIPTIVE FOLDER

ATLANTA CLASSIFIED DIRECTORY

CIRCULATED THROUGHOUT ATLANTA

Atlanta Classified Directory 134 Whiteford Ave., S. E. Atlanta, Ga.

We propose to publish the ad and listing that is attached to this form. It is understood and agreed that the attached listing or ad was taken from an independent publication and is subject to your approval, submitted to you as a sample wording for our new Atlanta Directory circulated and distributed to selected leading Buyers, business concerns and paid advertisers located in Atlanta and surrounding areas. This is a new annual publication not connected with any other directories or Atlanta telephone company or its affiliates. Your check will be accepted as approval by you. This form is for advance payment and is not an invoice.

ATLANTA CLASSIFIED DIRECTORY

RETURN THIS FORM WITH CHECK to cover the period of 1 year for an advertisement similar to the one attached

This ad was taken from the Atlanta telephone directory yellow pages.

Furnaces-Gas

CAMPBELL COAL CO

BRYANT AUTOMATIC GAS FURNACES
For Every Requirement
FLOOR FURNACES
Gravity or Forced Air
BASEMENT FURNACES
AND SPACE HEATERS
"It Pays to Buy the Best"
238 Marietta NW----------CYpress-4747

AD WILL NOT BE PUBLISHED UNLESS THIS FORM IS RETURNED WITH PAYMENT

Cost Per Year $30.00

TOTAL.....

Make Checks Payable to
Atlanta Classified Directory
134 Whiteford Ave., S. E.
AND RETURN IN ENCLOSED ENVELOPE

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 198

WILLIAM SILVERMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 16) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 9, 1954 (R. 369). The petition for a writ of certiorari was filed on July 8, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

1. Whether the record contains substantial evidence to support the verdict on a charge of using the mails with intent to defraud.

2. Whether testimony of the impression made upon witnesses by petitioner's literature was admissable in view of the admission that they would not have been deceived had they read the fine print.

STATUTE INVOLVED

18 U. S. C. 1341 and 1342 provide, in pertinent part:

§ 1341. Frauds and swindles.

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money, or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at

the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§ 1342. Fictitious name or address.

Whoever, for the purpose of conducting, promoting, or carrying on by means of the Post Office Department of the United States, any scheme or device mentioned in section 1341 of this title or any other unlawful business, uses or assumes, or requests to be addressed by, any fictitious, false, or assumed title, name, or address or name other than his own proper name, or takes or receives from any post office or authorized depository of mail matter, any letter, postal card, package, or other mail matter addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own proper name, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

In the District Court for the Northern District of Georgia, a jury found petitioner guilty on all counts of a fifteen-count indictment charging violations of 18 U. S. C. 1341 and 1342, by using the United States mails for the purpose of furthering a scheme to defraud, and by using a fictitious name and address in the furtherance of the scheme (R. 349). He was sentenced to two years' imprison-

ment on each of the fifteen counts, the sentences to run concurrently (R. 350). On appeal the judgment was unanimously affirmed (R. 369).

Petitioner's basic contention is that the record is devoid of substantial evidence to support his conviction. The record may be summarized as follows:

Petitioner air-mailed from Cleveland, Ohio, to business houses in Atlanta, Georgia, 30,000 solicitations for advertising (R. 8, 29, 30, 151). The addressees were selected from the yellow pages of the telephone directory published by the Southern Bell Telephone and Telegraph Co. for the Atlanta, Georgia, area (R. 145). Briefly described, the solicitation (Pet. 23) was very prominently captioned "Atlanta Classified Directory", the phrase appearing four times; an address, 134 Whiteford Ave., S. E., was given, and the reader was twice directed to return the form with payment; attached was the addressee's classified advertisement clipped from the Atlanta telephone directory, with a third warning, "Ad will not be published unless this form is returned with payment." The "cost per year" was set out as on a bill. In the smallest print on the solicitation, in italics, was printed:

> We propose to publish the ad and listing that is attached to this form. It is understood and agreed that the attached listing or ad was taken from an independent publication and is subject to your approval, submitted to you as a sample wording for our new Atlanta Directory circulated and distributed to selected leading

> Buyers, business concerns and paid advertisers located in Atlanta and surrounding areas. This is a new annual publication not connected with any other directories or Atlanta telephone company or its affiliates. Your check will be accepted as approval by you. This form is for advance payment and is not an invoice.

Prosecution witness Therrell testified that on receipt of the solicitation in the first part of October 1952, he believed it was a telephone company bill and sent his check to the address listed on the solicitation (R. 14, 15, 16). On cross-examination he conceded that had he read the solicitation he would not have been led to believe that he was dealing with the telephone company (R. 20). Witness Green testified to the same effect (R. 21, 22, 28). Five other witnesses testified similarly with respect to the receipts of the solicitation through the mails, the effect of such literature upon them, and the sending of checks, and it was stipulated that their testimony need not be transcribed but could be considered by the Court of Appeals in all respects as if contained in the record (R. 358).

An employee of a mailing service located at 134 Whiteford Ave., S. E., in Atlanta, testified that petitioner came there on October 1, 1952 (R. 31, 32), inquired as to printing a directory (R. 32, 33), and arranged to use that office as a forwarding address (R. 34, 38) and to use desk space there (R. 36). Although he gave the mailing service address as his

residence, in registering to do business in Atlanta, it was shown not to be his residence (R. 55, 56). On the 7th of October the mailing service received numerous calls asking the meaning of the solicitation (R. 39, 45). A postal fraud investigation begun by Inspector Callaghan (R. 60) showed that petitioner expected Post Office civil proceedings against him, but believed that he could not be prosecuted criminally (R. 61, 62, 63). Callaghan testified that petitioner told him that he had performed a similar operation in Cleveland (R. 81, 82, 83, 99). Another venture had been started in Houston, Texas (R. 149, 150, 213, 214).

One Porath, who, from Cleveland, printed and mailed the solicitations for petitioner, testified that petitioner wanted the mailing done in the first part of October (R. 146) and that Porath suggested postponement until October 6 (R. 147). An advertisement had been published by the telephone company on October 6 announcing the "last call for new and changed listings in the new telephone directories going to press" (R. 110, 111, 190, 191). Porath testified that no contract had actually been made for printing a directory for Atlanta or elsewhere, that he had made up a dummy for a Cleveland directory but that petitioner had never seen it (R. 139, 140, 142, 143). At petitioner's request Porath sent him a letter stating that Porath "was supposed to do his Atlanta directory" (R. 152, 153).

Petitioner received three hundred and fifty (350) letters, containing checks in the total amount

of approximately $7,000 in reply to his Atlanta solicitations (R. 236, 366). He himself testified that he hoped for no better than a 1 per cent reply to the solicitation (R. 218).

Petitioner testified at length as to his good faith, asserting that he acted on advice of counsel (R. 246, 247); that he had made some publication arrangements for the Atlanta publication though he had not contracted for publication (R. 248); that he rented an office when the mailing service ousted him (R. 257); that though he had never published a Cleveland directory after collecting $3500, he still intended to do so (R. 263).

ARGUMENT

1. Of the two elements of mail fraud, a scheme intended to defraud and use of the mails (*Pereira* v. *United States,* 347 U. S. 1, 8), petitioner disputed only his intent to defraud.

His contention that the evidence fails to support the verdict against him on this point is without merit. The solicitation was prominently captioned "Atlanta Classified Directory," with the addressee's telephone-book advertisement affixed thereto, in juxtaposition to an apparent statement and an admonition "ad will not be published unless this form is returned with payment." The facts with respect to lack of publication arrangements discredit petitioner's protestations of good faith.

On the evidence the issue was plainly to be submitted to the jury. *Rosenthal* v. *United States,* 18 F. 2d 24 (C. A. 3). In doing so the court fully and

carefully explained to the jury petitioner's contention of good faith (R. 321) and charged fully regarding its significance (R. 322, 323, 324, 326, 327).

2. Equally without merit is petitioner's contention that the testimony of the impression on the persons receiving the material was inadmissible since they admitted that they would not have been deceived had they read the fine print on the solicitation. It is well settled that intent to deceive may be inferred though the solicitation be devoid of any technical falsehood, and "[q]uestions of fraud may be determined in the light of the effect advertisements would most probably produce on ordinary minds." *Donaldson* v. *Read Magazine,* 333 U. S. 178, 189; *Durland* v. *United States,* 161 U. S. 306.

CONCLUSION

The case was correctly decided below and it is respectfully submitted that the petition for a writ of certiorari should be denied.

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AUGUST, 1954.

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